

ORIGINAL

DOCKET FILE COPY ORIGINAL  
CS Docket No.

CS Docket No. 96-83

RECEIVED  
MAY

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

ComTech Associates, Inc., by its attorney, hereby submits comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.

ComTech Associates, Inc. ("ComTech") is a company formed, in part, to pursue Local Multipoint Distribution Service ("LMDS") licenses. ComTech believes that LMDS holds tremendous potential to serve as a principal source of competition not only to current monopoly and dominant video programming distributors, but also to monopoly local exchange carriers. Indeed, ComTech believes that telecommunications services, including local exchange and exchange access services, may emerge as significant, if not the primary, offerings of LMDS operators. Given the strong commitment of Congress and the Commission to fostering competition in both the local exchange and the video programming distribution market, ComTech respectfully urges the Commission to include LMDS transmit and receive antennas in its rules preempting restrictions on over-the-air reception devices.

No. of Copies rec'd  
List ABCDE

One significant potential barrier facing the nascent LMDS industry is the same barrier facing the MMDS industry - local zoning regulations that restrict the use of antennas on subscriber premises. ComTech believes that unless the Commission acts to preempt unwarranted zoning restrictions affecting LMDS devices, its pro-competitive goals in establishing the LMDS service, and promoting local loop competition, will be thwarted.

Specifically, ComTech is concerned that, absent Commission action, LMDS transmit and receive devices may "slip through the cracks" of the Commission's existing and pending preemption rules, despite the near-identical interests involved. At its February 29, 1996, open meeting, the Commission, acting in IB Docket 95-59, revised its existing rules preempting local regulations restricting the use of satellite receive-only antennas and satellite transmit antennas.<sup>1/</sup> The Commission also proposed to use the same preemption standard as a basis for implementing Section 207 of the Telecom Act, which directs the Commission to adopt rules preempting local and state regulations that "impair a viewer's ability to receive video programming services" through direct broadcast satellite (DBS), multichannel multipoint distribution services (MMDS), and "devices designed for over-the-air reception of TV broadcast signals."<sup>2/</sup> The Commission further proposed to extend the preemption to private covenants that impose unreasonable restrictions on the use of antennas.

ComTech believes that the scope of the proposed preemption should be extended to encompass LMDS transmit and receive devices. ComTech intends to use antennas on

---

<sup>1/</sup> *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, Report and Order and Further Notice of Proposed Rulemaking (Adopted February 29, 1996, released March 11, 1996).

<sup>2/</sup> *Telecommunications Act of 1996*, Pub. Law 104-104, Section 207.

subscriber premises both for over-the-air reception of broadcast signals and as transmit devices used to transmit telecommunications signals. ComTech submits that the same public interest considerations that motivated the Commission to preempt zoning regulations affecting satellite antennas and Congress to enact Section 207 apply to LMDS transmit and receive devices.

It seems as though LMDS is neither fish nor fowl in the context of the Commission's preemption proceedings. LMDS preemption was not included in the Report and Order in the preemption for transmit and receive satellite earth stations (IB Docket 95-59), and was not included in this Notice of Proposed Rulemaking for MMDS preemption.

LMDS is similar to MMDS, in that the service will be used to provide multichannel video distribution to subscribers. LMDS transmit and receive antennas on subscriber premises are expected in most or all instances to be less than eighteen inches in size, similar in size to DBS and MMDS antennas.

LMDS is unlike MMDS in that the service has the potential to use transmit and receive antennas, similar to satellite earth stations. The mere fact that LMDS antennas may be used as transmit devices, as well as receive devices, should not prevent the Commission from including LMDS in this preemption proceeding. The Commission, in adopting its preemption rules for satellite earth stations, did not distinguish between receive only and transmit and receive earth stations.<sup>3/</sup>

---

<sup>3/</sup> "Any state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth stations antennas..." 47 C.F.R. 25.104(a) (Emphasis added).

LMDS will likely be deployed in cells, similar cellular telephone service. The transmit power of an LMDS transmit and receive transmitter will not likely be higher than one watt, slightly higher than a hand-held cellular telephone, but much less than a cellular phone installed inside an automobile. ComTech firmly believes that LMDS transmit and receive antennas pose no possible health or safety risks. If, however unlikely, a health or safety risk is discovered, the Commission's proposed rule takes that into account. The proposed rule states that the unreasonableness presumption may be rebutted if the regulation "is necessary to accomplish a clearly defined health or safety objective."<sup>4/</sup>

ComTech concurs with the Commission's proposed rule in this proceeding. However, for the reasons stated above, the preemption should apply equally to LMDS transmit and receive antennas. In this regard, ComTech notes that Congress, in section 704 of the Telecom Act, expressed its clear intent to prohibit local governments from blocking the placement of antennas on the basis of the "environmental effects of radio frequency emissions."<sup>5/</sup> Attached hereto is an amended proposed rule, extending the preemption of local zoning ordinances to LMDS transmit and receive antennas.

The Commission's statutory authority to adopt such a broad preemption standard is clear, and has been fully enunciated by the Commission in the IB Docket 95-59 proceeding.<sup>6/</sup> Congressional intent with regard to such preemption is also clear in Sections

---

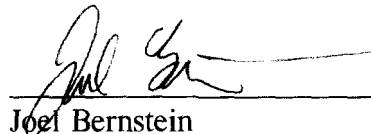
<sup>4/</sup> Proposed rule, Section (a)(2)(A).

<sup>5/</sup> *Telecommunications Act of 1996*, Pub. Law 104-104, Section 704.

<sup>6/</sup> See, e.g., *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 10 FCC Rcd 6982 (1995).

207, 704, and 253(a) of the Telecom Act.<sup>2/</sup> This proceeding is the perfect opportunity for the Commission to preempt local zoning restrictions for LMDS transmit and receive antennas. Certainly, if the Commission does not act to preempt local zoning restrictions for LMDS transmit and receive antennas in this proceeding, the LMDS industry will request that the Commission preempt those restrictions in another proceeding. That potential deployment and use of valuable Commission resources can be avoided by including preemption of local zoning restrictions for LMDS transmit and receive devices in the rules promulgated as a result of this proceeding. Dealing with this issue in this proceeding will give the LMDS industry the certainty it needs to become a true telecommunications competitor.

Respectfully submitted



Joel Bernstein  
Attorney for ComTech Associates, Inc.  
Halprin, Temple, Goodman and Sugrue  
1100 New York Ave., N.W., Suite 650E  
Washington, DC 20005

ComTech Associates, Inc.  
600 E. Las Colinas Boulevard #540  
Irving, Texas 75039  
Jason Priest, President

---

<sup>2/</sup> Section 253(a) states that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." *Telecommunications Act of 1996*, Pub. Law 104-104, Section 253(a).

Amended Proposed Rule:

(Note: Text appearing in ~~strikeout~~ is to be deleted and text appearing underlined is to be added)

- (a)(1) Any state or local zoning, land-use, building, or similar regulation, that affects the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast signals ~~or~~ a multichannel multipoint distribution service, or local multipoint distribution transmit and receive service shall be presumed unreasonable and is therefore preempted subject to paragraph (a)(2). No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (b), or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to paragraph (a)(2).
- (2) Any presumption arising from paragraph (a)(1) of this section may be rebutted upon a showing that the regulation in question:
  - (A) is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;
  - (B) is no more burdensome to television broadcast service ~~or~~ a multichannel multipoint distribution service reception device, or local multipoint distribution service transmit and receive device users than is necessary to achieve the health or safety objective; and
  - (C) is specifically applicable on its face to devices designed for over-the-air reception of television broadcast signals ~~or~~ a multichannel multipoint distribution service, or local multipoint distribution transmit and receive service.
- (b) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.
- (c) No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming signals from the over-the-air television broadcast ~~or~~ a multichannel multipoint distribution service, or local multipoint distribution transmit and receive service.